No. 77-1748

In the Supreme Court of the United States

OCTOBER TERM, 1978

MCCULLOCH GAS PROCESSING CORPORATION,
PETITIONER

v.

CANADIAN HIDROGAS RESOURCES, LTD., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BARBARA ALLEN BABCOCK,
Assistant Attorney General,

WILLIAM KANTER,
STEPHANIE LACHMAN GOLDEN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1748

MCCULLOCH GAS PROCESSING CORPORATION,
PETITIONER

v.

CANADIAN HIDROGAS RESOURCES, LTD., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 5-18) is reported at 577 F. 2d 712.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 1978. The petition for a writ of certiorari was filed on June 8, 1978. The jurisdiction of this Court is invoked under Section 211(g) of the Economic Stabilization Act of 1970, as added, 85 Stat. 750, 12 U.S.C. 1904 note, as incorporated by reference in Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, 87 Stat. 633, as amended, 15 U.S.C. 754(a)(1).

QUESTION PRESENTED

Whether Section 210 of the Economic Stabilization Act of 1970 or the Due Process Clause of the Fifth Amendment waives the immunity of the United States from claims for money damages that are not based on an alleged taking of property for a public purpose.

STATEMENT

Pursuant to its authority under the Emergency Petroleum Allocation Act of 1973 87 Stat. 627, as amended, 15 U.S.C. 751 *et seq.*, the Federal Energy Administration[1] issued a number of orders in 1974 and 1975 requiring petitioner to continue to supply quantities of propane gas to a number of affiliated Canadian corporations ("Hidrogas") (Pet. 6-8). Petitioner pursued an administrative appeal of those orders, and in February 1975 FEA modified its January 1975 allocation order by eliminating the emergency pricing provision contained therein (Pet. 8). Petitioner alleges that Hidrogas has not made full payment for the propane that was delivered before February 1975 (Pet. 6).

Petitioner then brought this action, seeking injunctive relief and damages against Hidrogas, the United States, and the Regional Administrator of FEA. Petitioner's claim for damages was based on its contention that FEA's orders requiring petitioner to sell propane to Hidrogas were arbitrary and capricious and therefore denied petitioner due process of law (Pet. 5-6). Petitioner contended that the district court had jurisdiction under Section 211 of the Economic Stabilization Act of 1970, as added, 85 Stat. 748, 12 U.S.C. 1904 note, and that Section

[1]As of October 1, 1977, pursuant to the Department of Energy Organization Act (Pub. L. 95-91, 91 Stat. 565, to be codified in 42 U.S.C. 7101 *et seq.*) and Executive Order 12009 (42 Fed. Reg. 46267), the FEA became part of the newly established Department of Energy.

210 of the Act, as added, 85 Stat. 748, 12 U.S.C. 1904 note,[2] created a cause of action for damages against both private and federal defendants (Pet. 2).

The district court rejected the federal respondents' contention that sovereign immunity barred the claim for damages (Pet. App. 2) but certified the question for interlocutory appeal (Pet. App. 4).

The court of appeals reversed, holding that Sections 210 and 211 had not waived the immunity of the United States from damage claims except in cases of uncompensated taking in violation of the Fifth Amendment. The court concluded that neither the language nor the legislative history of Section 210 indicated Congress' intent to waive the sovereign immunity of the United States from claims like petitioner's that are not based on an alleged taking of property (Pet. App. 15):

> To expose FEA to damage actions based on its regulations and orders would constitute a highly unusual choice by Congress, and we will not impute such a decision to the legislature when plaintiff can offer no evidence, apart from an ambiguous statute, in support of its position.

ARGUMENT

The court of appeals' decision is correct. The court applied accepted principles to the facts of this case, and there is no reason for review by this Court.

Petitioner errs in contending that Sections 210 and 211 of the Economic Stabilization Act of 1970 waived the United States' sovereign immunity from the damage

[2]The Emergency Petroleum Allocation Act of 1973, 87 Stat. 633, 15 U.S.C. 754(a)(1), adopts by reference the judicial review provisions of the Economic Stabilization Act, including Sections 210 and 211 of the latter Act.

claims asserted in petitioner's complaint. In *United States* v. *Testan*, 424 U.S. 392, 399, this Court reaffirmed the principle that "a waiver of the traditional sovereign immunity 'cannot be implied but must be unequivocally expressed.' *United States* v. *King*, [395 U.S. 1, 4]." Nothing in Sections 210 and 211 of the Economic Stabilization Act of 1970 expressly subjects the United States to damages liability.

Section 211 is principally a jurisdictional statute. Section 211(a) provides the district courts with exclusive jurisdiction over cases "arising under this title, or under regulations or orders issued thereunder, notwithstanding the amount in controvery * * *," and Section 211(b) places exclusive appellate jurisdiction in the Temporary Emergency Court of Appeals. Section 211(d)(2) also provides that district courts may enjoin the application of regulations and orders promulgated under the statute, but it makes no reference to damages.

Section 210(a) provides in pertinent part that "[a]ny person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action * * * for appropriate relief, including an action for a declaratory judgment, writ of injunction * * * and/or damages." But Section 210 does not refer to actions against the United States, and it was plainly designed to authorize actions against private persons who violate the statute and the pricing and other regulations promulgated under it. Thus Section 210(b) relates to "any action brought under subsection (a) against any person renting property or selling goods or services who is found to have overcharged the plaintiff * * *," and subsection (c) defines "overcharge." In short, Section 210 was designed to help enforce federal regulations, not to require the United States to pay damages for promulgating regulations. Indeed, as the court of appeals observed, it would have

been "highly unusual" for Congress to have subjected the United States to damage liability arising out of the myriad regulations and orders issued under the statute without saying so in unequivocal terms (Pet. App. 15).

Contrary to petitioner's contentions, *Griffin* v. *United States*, 537 F. 2d 1130 (T.E.C.A.), certiorari denied, 429 U.S. 919, and the *Regional Rail Reorganization Act Cases*, 419 U.S. 102, do not support it. In *Griffin* an oil producer contended that FEA's two-tiered system of price regulations constituted a taking of property for which the Fifth Amendment required compensation. The court of appeals concluded that Section 210 would provide a remedy for uncompensated takings. But the court explicitly restricted its holding to "takings" claims, as it explained here. Compare 537 F. 2d at 1137-1140 with Pet. App. 7-13. The two decisions do not conflict.[3] Similarly the *Regional Rail Reorganization Act Cases* were concerned only with alleged takings of property. The Court simply concluded that the Rail Reorganization Act had not withdrawn a Tucker Act remedy for alleged takings of property that was otherwise available. 419 U.S. at 134-136.

Where, as in this case, a claim for damages is not based on an alleged taking of property, there is no basis for implying a waiver of traditional sovereign immunity when the statute itself does not expressly so provide. As the Court said in *Testan, supra*, 424 U.S. at 401, in rejecting an argument similar to petitioner's based on the *Rail Reorganization Act Cases* and other taking cases: "These Fifth Amendment cases are tied to the language, purpose, and self-executing aspects of [the Just Compensation

---

[3]What is more, any inconsistency between decisions of one court of appeals would be for that court to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902.

Clause]* * *, and are not authority to the effect that the Tucker Act eliminates from consideration the sovereign immunity of the United States."

There is nothing to petitioner's further contention (Pet. 20-28) that the Due Process Clause—on which its damage claims are based—itself waives sovereign immunity. See *Testan, supra*, 424 U.S. at 401-402 (emphasis supplied): "Where the United States is the defendant and the plaintiff is not suing for money improperly exacted or retained, the basis of the federal claim—*whether it be the Constitution*, a statute, or a regulation—does not create a cause of action for money damages unless, as the Court of Claims has stated, that basis 'in itself * * * can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained' " (quoting *Eastport Steamship Corp.* v. *United States*, 372 F. 2d 1002, 1008 (Ct. Cl.)). Unlike the Just Compensation Clause, the Due Process Clause cannot "fairly be interpreted as mandating compensation * * * for the damage sustained." See *Duarte* v. *United States*, 532 F. 2d 850 (C.A. 2).[4]

---

[4]The cases cited by petitioner (Pet. 20-28) are wholly inapposite. They involve damage claims against individual officials (*e.g., Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388), claims for equitable relief (*Ballard* v. *Laird*, 6 CCH Empl. Prac. Dec. para. 8793 (S.D. Cal.)), actions against non-government parties (*J.I. Case Co.* v. *Borak*, 377 U.S. 426), or claims against municipalities under 42 U.S.C. 1983 (*Monell* v. *Department of Social Services*, No. 75-1914, decided June 6, 1978). None involves damage claims against agencies of the federal government.

Although one of the federal respondents is an individual officer of the FEA, petitioner has not separately addressed his status and has not contended that his actions would give rise to personal liability under principles set forth in *Butz* v. *Economou*, No. 76-709, decided June 29, 1978. Petitioner has not alleged that respondent Arntz acted in bad faith, and because his actions were taken in the ordinary course of his duties such an allegation could not be sustained. See *Procunier* v. *Navarette*, 434 U.S. 555.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BARBARA ALLEN BABCOCK,
Assistant Attorney General.

WILLIAM KANTER,
STEPHANIE LACHMAN GOLDEN,
Attorneys.

SEPTEMBER 1978.

DOJ-1978-09